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RESPONSE TO WILLIAM W. BUZBEE, *DEREGULATORY SPLINTERING*: WHAT MIGHT THE OTHER SIDE SAY?

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I like Professor Buzbee's paper, and I basically agree with it. His putting together of various law-related thrusts of the present Administration into a pattern of "deregulatory splintering"—"a string of actions that might in aggregate have the effect of rescinding the earlier regulation, but with no step involving a full and direct analysis of underlying law and fact questions"[1]—is itself very illuminating. And his reading of the essential precedents, here and in his companion paper in the B.U. Law Review,[2] is persuasive: the legally correct way of "rescinding the earlier regulation" is to go through the process of producing and justifying a new, substitute regulation.

Legal argument is, however, comparative. As generations of law professors have taught their students, you do not really know your own case unless you can state the other side and explain why your argument is better. As one of those professors, I am going to try to follow my own advice.

What might the Trump Administration say to justify "deregulatory splintering"—not incident by incident, but as a general approach—not politically, but as a potentially acceptable approach to legal matters? What, in other words, do we imagine to be a Hypothetical Trump Administration Jurisprudence (or HTAJ)?[3] Here goes:

As Lon Fuller convincingly wrote three-quarters of a century ago, all law embraces both reason and fiat.[4] Law depends in its very essence—definitionally—not just on reason but also on the positive input of will. "Every rule of law that has enough meaning in it to be useful to lawyers and judges will inevitably contain within it the antinomy of reason and fiat

1. William W. Buzbee, *Deregulatory Splintering*, 94 CHI.-KENT L. REV. 439 (2019).

2. *See generally* William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357 (2018) [hereinafter Buzbee, *The Tethered President*].

3. I want to make clear that what follows is truly hypothetical: I have made no attempt to ground it in actual statements or legal arguments presented by the Administration. Nor, I should add, do I claim that it is what the President, himself, thinks or should think: it is a response to the approach taken by the Administration as a whole, as Professor Buzbee depicts it.

4. Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946). Despite the title, Fuller's basic claim clearly encompassed constitutional and statutory law as well as the common law. *Id.* at 387–88.

that runs throughout the law."[5] But Fuller, wanting to make this basic point, had no need to consider whether the balance between reason and will might be different in different corners of the law. By contrast, we, living in what we now call the administrative state, can see that, whatever might be the right balance of reason and will elsewhere in the law, regulatory law depends heavily on the positive input of politically established energy. A will actively enforcing the rules is a necessary, although not sufficient, condition for regulation. Accordingly, even though some quantum of reason might remain to support an established rule, when the energy behind it departs, regulatory law departs also. At the same time, other forms of law, more dependent on reason and less on fiat, still exist in the background. Accordingly, what takes place is not a rejection of the "rule of law" as a whole, but rather a choice being made—a legitimate choice if the political will is legitimate—among the law's various modalities. Correspondingly, to announce a moratorium in the enforcement of a regulatory rule, or even to ask for a stay to decide what the political will should be, is not to deny transparency and political accountability as elements of the rule of law, but to embrace them.

No doubt much of existing administrative law contravenes HTAJ as just stated. In particular, by making the loss of political will sufficient to be the basis for deregulation, HTAJ implicitly embraces the proposition that deregulation is jurisprudentially different from regulation, a proposition explicitly rejected in the *State Farm* case.[6] But the extent to which the existence of law depends on the existence of enforcement is a question that runs throughout the law and is not so easily settled. If a statute of State X still makes adultery a crime, but no prosecution under the statute has been brought in living memory, what is the law of the State?[7] Does the responsible Washington lawyer give advice based solely on the statutes and regulations governing a particular subject, or does she also advise on enforcement policy?[8] Is a guidance document issued by an agency, advising as to its

5. *Id.* at 387.

6. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("[T]he direction in which an agency chooses to move does not alter the standard of judicial review established by law.").

7. *See* State *ex rel.* Canterbury v. Blake, 584 S.E.2d 512, 516 (W. Va. 2003) (stating desuetude is alive and applicable to crimes that are *malum prohibitum* but not crimes *malum in se*). More generally, although the doctrine of desuetude is not much favored by American courts, the issue may arise under other rubrics. *See* Corey Chivers, *Desuetude, Due Process, and the Scarlet Letter Revisited*, 1992 UTAH L. REV. 449 (1992).

8. *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 624–33 ("The Problem of Legal Realism").

enforcement policy, law or not law?[9] The "law depends on active enforcement" answer to these questions may or may not prevail, but it surely is not trivial. And taken to a more abstract level, the words I have put in the mouth of HTAJ are not so far from Holmes' famous proposition, in *The Path of the Law*, that we know the law best if we see it as the bad man would see it, as a prediction of the incidence of official force.[10]

If the position is tenable, on what basis should we (at least Professor Buzbee and I) reject it? One much-scouted response is to rely on the Administrative Procedure Act (APA), particularly the provisions for notice and comment rulemaking as buttressed by the definition of rulemaking to include "agency process" not only for "formulating" a rule, but also for "amending, or repealing a rule."[11] As Professor Buzbee argues, the readings of these provisions given by landmark Supreme Court cases establish an "it takes a rule to get rid of a rule" principle, and require the latter rule to be at least as extensively supported as the former. This is a right reading of the cases from at least the early 1980s onward, but, from a broader point of view, I think an HTAJ reading of the APA is possible. The text describing the notice and comment process is, after all, that "the agency shall give interested persons an opportunity to participate" and "shall incorporate in the rules adopted a concise general statement of their basis and purpose."[12] To say that the statute requires an exhaustive discussion of the relevant data, an examination of the alternatives, an extensive connecting of the law to the facts, a specific consideration of the support for the prior rule, and perhaps even a cost/benefit analysis, is to ignore how much our present legal culture brings an attitude to the APA, rather than drawing an attitude from it. A "concise general statement of their basis and purpose" could be read to require simply a statement of what the agency intends to take into account in enforcing the rules, so that the public will know. Indeed, the Attorney General's Manual on the Administrative Procedure Act, written in 1947 "as a guide to the agencies in adjusting their procedures to the requirements of the Act,"[13] seems to take that point of view.[14] Perhaps it is

9. A much-debated topic. *See* STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 356 (12th ed. 2018).

10. Oliver W. Holmes, Jr., *The Path of The Law*, 10 HARV. L. REV. 457, 457–62 (1897).

11. 5 U.S.C. §§ 553, 551(5) (2012).

12. 5 U.S.C. § 553(c).

13. TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 6 (1947).

14. Discussing the "concise general statement of their basis and purpose," the Manual states: "The required statement will be important in that the courts and the public may be expected to use such statements in the interpretation of the agency's rules. The statement is to be 'concise' and 'general.' Except as required by statutes providing for 'formal' rule making procedure, findings of fact and con-

sufficient to say that adopting the HTAJ standpoint would require a revolution in the current case law interpreting the APA, but I would be uncomfortable relying only on that.

To reject HTAJ, I think we have to go further. And Professor Buzbee means to go further. His case is set out in greater detail in his companion piece in the B. U. Law Review: *The Tethered President: Consistency and Contingency in Administrative Law.*[15] There he argues that "the 'contingencies'"—by which he means the complex web of law and fact in which agency action is imbedded—"the 'contingencies' underlying an initial policy action must always be engaged by a later advocate of policy change."[16] Beyond being required by existing law, this engagement is necessary because modern society, and correspondingly the regulation of modern society, is complex, both factually and legally. Any regulatory effort, whether more or less stringent, must deal with that reality to be consistent with governing legislation and sensible as a practical matter. On this view, HTAJ's view of the proper balance of reason and fiat in regulatory law is simply wrong in the sense that it leads to unauthorized or irrational action.[17]

There is obviously much to be said for this proposition, especially as regards its application to detailed economic and environmental regulation. But does it cover the whole terrain? As a test, we might consider the Clinton Administration's treatment of what was known as the "gag rule"—which would also have the virtue of pointing out that "deregulatory splintering" may be more common under President Trump but is not wholly new.

Title X of the Public Health Service Act of 1970 provided financial grants to support family planning clinics but also stated (in a pre-*Roe* statute) that none of the grant money "shall be used in programs where abortion is a method of family planning."[18] How far did this language go? The initial set of regulations simply required that grantees "not provide abortions"; by 1981 the regulations mandated non-directive counseling of a pregnant woman's options, including abortion, when the patient requested it. But in 1988, after a notice-and-comment proceeding, the Reagan Administration's Department of HHS promulgated new regulations that at every turn required grant recipients to avoid giving advice or making referrals

clusions of law are not necessary. Nor is there required an elaborate analysis of the rules or of the considerations upon which the rules were issued. Rather, the statement is intended to advise the public of the general basis and purpose of the rules." *Id.* at 32.

15. *See* Buzbee, *The Tethered President*, *supra* note 2.

16. *Id.* at 1358.

17. *See id.* at 1424–26 ("Consistency Doctrine's Policy Merits").

18. Pub. L. No. 91-572, § 6(c), 84 Stat. 1504, 1508 (1970) (codified at 42 U.S.C. § 300a-6).

concerning abortions, even upon specific request. Instead, it allowed grantees to say—perhaps encouraged them to say—that "the project does not consider abortion an appropriate method of family planning."[19] Reviewed in *Rust v. Sullivan*,[20] the regulations survived administrative law review (as well as constitutional challenge). As regards *Chevron*, the statute was obviously ambiguous; under *State Farm*, the Secretary's explanation, which included determinations "that the new regulations are more in keeping with the original intent of the statute, are justified by client experience under the prior policy, and are supported by a shift in attitude against the 'elimination of unborn children by abortion,'" sufficed.[21]

During the George H.W. Bush administration, efforts to get rid of this "gag rule" by statute passed both Houses of Congress but were vetoed by the President.

Enter President Clinton. On January 22, 1993—that is, two days after his inauguration—Clinton issued a "Memorandum on the Title X 'Gag Rule.'" Directed to the Secretary of HHS, reciting that the Gag Rule "endangers women's lives and health," "interferes with the doctor-patient relationship," and "contravenes the clear intent" of Congressional majorities, it stated that "you have informed me that you will suspend the Gag Rule pending the promulgation of new regulations." Following up, on February 5, 1993, the new Secretary of HHS, by "interim rule," "suspended" the 1988 regulations and reinstated the previously effective compliance standards which provided for "nondirective" counseling as to abortion, and a referral to a provider if requested. The Notice recited that notice-and-comment process as to this suspension was being waived "for good cause." It stated that "[t]he issues involved in this matter are well known and have been extensively debated." And it said that the Secretary had concluded, among other things, that "suspension of the regulation, though tantamount to a statement of enforcement policy, is preferable because it provides clearer guidance and more certainty to the grantees and to women making family planning decisions" and that "evidence exists that the continued failure to provide women with complete and accurate medical information will result in significant health risks. The Notice of Proposed Rulemaking being contemporaneously published will give those with differing views on the matter an opportunity to rebut this conclusion."[22] Simultaneously, the

19. HHS Grants for Family Planning Services Rule, 42 C.F.R. § 59.8(b)(5) (1988).

20. 500 U.S. 173, 173 (1991).

21. *Id.* at 187.

22. Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 58 Fed. Reg. 7462 (Feb. 5, 1993) (to be codified at 42 C.F.R. pt. 59).

Secretary issued a notice of a proposed rulemaking to formally revoke the 1988 regulation and reinstate the 1981 rules. Comments were due "on or before April 6, 1993."[23]

After which, nothing happened. Indeed, nothing was heard until July 3, 2000, when the proposed regulation was finalized, returning to the pre-Reagan regulations with one revision.[24] In short, for the entire Clinton Presidency minus a few months, the Title X grant rules had been deregulated by splintering.

It is hard to see this whole story as representing anything but applied Executive will. The Supreme Court acknowledged that the Reagan Administration's rules represented a "sharp break" with prior regulations, but accepted as part of the required justification the Administration's claim that the new rules were "supported by a shift in attitude against the 'elimination of unborn children by abortion,'"[25] which seems to be just another way of saying that the Republicans had been elected. The Clinton Administration, for its part, seemed to equate the law with "a statement of enforcement policy," disparaged the idea that anyone might have something to tell them, and hypothesized the existence of evidence without allowing contestation. (As to the President's claim that it was not just executive will, that he was only doing what a majority of Congress wanted but which had been stymied by the previous President, it is hard to avoid the riposte: if that is so, let them pass the bill and sign it yourself!)

However, it is not clear why the balance between reason and will represented by this history—a balance that would seem to exemplify HTAJ—was wrong. Secretary Shalala was right, wasn't she, when she wrote that the issues were well known and had been much debated? It was true, wasn't it, that there was not going to be new evidence going to the heart of the matter and capable of changing minds? It really did come down, didn't it, to the question: which side are you on?

Or, to put the matter more abstractly: Is there at least a category of regulations for which HTAJ is a good fit? Should we recognize the legitimacy of that approach for—to put a name on it—rules relating to the culture wars? Should we say that the Administration in office, whether we agree with it or not, is allowed to pursue "deregulatory splintering" for that class of cases?

23. *Id.*

24. Standards of Compliance for Abortion-Related Services in Family Planning Services Projects, 65 Fed. Reg. 41,270 (July 3, 2000) (to be codified at 42 C.F.R. pt. 59).

25. *Rust*, 500 U.S. at 187.

Having raised that question, and speaking now only for myself, I am of several minds. I do not like sham proceedings, not just because of the delay involved, but because of the way they seem to delegitimize process even when it really is needed—and I can't escape the idea that in many "culture wars" issues, holding a full notice-and-comment proceeding and acting as if there were a large quotient of reason involved, would be a sham. At the same time, I am dubious about patrolling the dividing line between "ordinary regulatory issues" and "culture wars issues." In modern political debate, for example, at least some participants consider "climate change" to be a "culture wars" issue—yet it is clear to me that here, if anywhere, Professor Buzbee's discussion of the need to address legal complexities and rich scientific data in very organized ways, rings true. Perhaps this is one of those areas, common in the law, where we ought to have an overbroad rule—in favor of rulemaking process—in order to avoid having to make the distinctions involved in allowing for an exception of the "culture wars" sort. Finally, there is a part of me that says we ought to reject HTAJ simply because tilting the jurisprudential balance that far in favor of fiat simply violates our understanding of law in a free society. I am tempted to argue for that view as implicit in the Constitutional text demanding the President "shall take Care that the Laws be faithfully executed"; linguistically that seems to assume that "the Laws" are something not defined by the extent of the President's "Care." But it would probably be fairer to locate the argument in the deep cultural desire to live in a rationally ordered society not simply subject to the "sovereign's will"—one of those deep background propositions which stand, perhaps unstated, at the base of administrative law.[26]

But, as a commenter it is my job to raise questions rather than write treatises, and so I will leave it at that.

26. *Cf.* Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 598–99 (2006) (arguing for the existence of foundational assumptions of administrative law).